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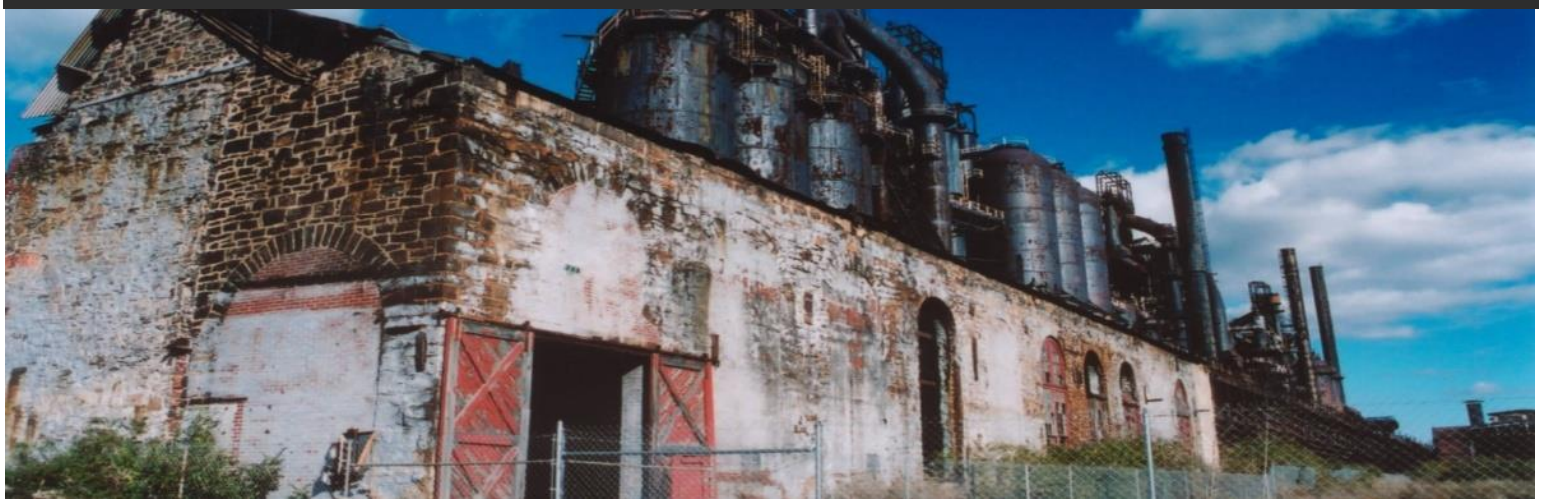
The Weirdness of Appeals Under Section 308 of Act 2



By David G. Mandelbaum | April 25, 2024 | The Legal Intelligencer

Pennsylvania has an aggressive brownfields remediation program under the Land Recycling and Environmental Remediation Standards Act (Act 2), 35 Pa. Stat. Ann. Sections 6026.101 to .908. Section 308 of Act 2 makes all "decisions by the Department of Environmental Protection involving the reports and evaluations required under Act 2 to be considered appealable actions under" the Environmental Hearing Board Act. That stands out from the rest of Pennsylvania environmental law. It has not been litigated very often, but it may pose risks for practitioners.

Act 2 has allowed remediators to obtain "cleanup liability protection" for thousands of sites across Pennsylvania by demonstrating that they have achieved an "environmental remediation standard" for each "regulated substance" contaminating the property.

The Act 2 process calls for a series of submissions to the Department of Environmental Protection, beginning with a notice of intent to remediate and culminating with a final report. The submissions in between vary depending on the nature of the remediation standard that the remediator seeks to achieve. If, as is common, a remediator were seeking to achieve a "site specific standard" by "pathway elimination," that remediator might submit some or all of a notice of intent to remediate, a remedial investigation report, a human health risk assessment, an ecological risk assessment, cleanup plan, and a final report. See 25 Pa. Code Sections 250.404 to .412.

The DEP does not decide whether the remediator obtains or does not obtain cleanup liability protection until the DEP's approval or disapproval of the final report. All other decisions of the DEP are what one would call interlocutory if the process were a lawsuit in the sense that a disapproval of a submission will call for a revision. The revision will form a new submission, and approval of the new submission will count as the DEP determination for the issues addressed in the revised submission.

Ordinarily, only the final action of the DEP—the action "adversely affecting a person"—would be appealable to the Environmental Hearing Board. See 35 Pa. Stat. Ann. Section 7514(c). But the Environmental Hearing Board "sees Section 308 as a strong indication that the Legislature wanted to make sure that decisions at each level of the Act 2 process are appealable." See *Neville Chemical v. Department of Environmental Protection (DEP)*, EHB Dkt. No. 2002-170-R, slip op. at 6 (Aug. 4, 2003). Indeed, *Neville Chemical* holds that the remediator could appeal denial of a "revised conceptual cleanup plan," a submission not enumerated in Act 2 at all.

Section 308 does not limit its reach to first-party appeals. A third-party adversely affected by a DEP decision on someone else's Act 2 submission would, arguably, have a right of appeal. See, e.g., *Tri-Realty v. Department of Environmental Protection (DEP)*, EHB Dkt. No. 2014-107-L, slip op. at 2 (July 9, 2015) and slip op. at 2 (July 17, 2015) (stating in the course of resolving two discovery disputes that "the department's approval of a remedial investigation report is an appealable action. See 35 P.S. Section 6026.308.") However, the Environmental Hearing Board has expressed skepticism over whether a third-party experiences an adverse effect from a decision on an intermediate Act 2 report. See *Citizen Advocates United to Safeguard the Environment v. DEP*, EHB Dkt. No. 2006-005-L, slip op. at 46-49 (Nov. 2, 2007).

If an action by the DEP could be appealed, then a failure to appeal renders the action "final as to the person" who could have appealed. See 35 Pa. Stat. Ann. Section 7514(c). What that means under Act 2 remains somewhat murky.

The extreme case occurs when a remediator makes a submission, the DEP rejects it, and the remediator then resubmits the same material with additional argument. When the DEP rejects the second submission, the failure to appeal the first rejection renders that rejection administratively final; the second round does not revive the appeal period. See *Olympic Foundry v. DEP*, EHB Dkt. No. 98-085-MG (Oct. 5, 1998).

Olympic Foundry was an atypical case in that DEP, in rejecting a notice of intent to remediate, a remedial investigation report, and a cleanup plan, stated "that the department will no longer consider any NIR for the … site." Typically, when the DEP disapproves a submission by a remediator under Act 2 the remediator is not then forever barred from demonstrating achievement of an environmental remediation standard. To the contrary, the DEP would conventionally spell out what it would like to see done, and the remediator will have an opportunity to revise or to supplement its report or its work. But if the remediator has not appealed from the earlier disapproval, that disapproval might be said to be "final" as to the remediator. Does that mean that every legal and factual determination embedded in the earlier disapproval is final for the purposes of any later submission, or does it merely mean that that earlier submission can never be revived and approved? Perhaps the better view would be that approval of a revised submission moots any dispute concerning the original submission, and so the original disapproval can have no preclusive effect if unappealed, but we do not have clear authority on that point of which I am aware.

Similarly, if a third-party could have appealed approval of an intermediate submission but did not, does that mean that the third party cannot then appeal any issue embedded in that earlier approval should the third-party seek to appeal a later submission or does it just mean that the third party cannot later overturn the earlier approval of the intermediate submission? The EHB offered some guidance in the *Tri-Realty* litigation. The discovery opinions cited above were in an appeal from a remedial investigation report. *Tri-Realty* later settled that appeal and appealed approval by the DEP of Tri-Realty's neighbor's later-submitted cleanup plan. In *Tri-Realty v. DEP*, No. 2016-013-B (Apr. 14, 2016), the board held that

issues necessarily resolved in the settlement of the earlier appeal were final as to Tri-Realty, but that its appeal from the later cleanup plan could proceed because all issues in that plan could not have been ripe to appeal until the DEP in fact approved it. The decision does not address the implications of un-appealed issues.

And, of course, the board has left somewhat open whether every third-party that might experience an adverse effect from approval of a cleanup plan or a final report necessarily experiences an adverse effect from, say, approval of a remedial investigation report. Therefore, some third-parties might not be able to appeal some intermediate decisions that a remediator might be able to appeal. We just do not know which they are.

This uncertainty makes appeals of Act 2 decisions somewhat unusual. We do not know with precision who can appeal which issues. We do not know with precision what implications a failure to appeal might have, and for whom.

The draftsmen of Act 2 intended Section 308 to serve a purpose. It reflects the distrust in what was then the Department of Environmental Resources' ability to approve reasonable cleanups in a reasonable time. It appears in the original version of the bill. See Pa. S. Bill 1 of 1995, Printer's No. 2, Section 309 (Jan. 17, 1995).

But the weirdness of Section 308 in comparison to conventional Pennsylvania administrative practice poses a bit of a practice problem about deciding whether to appeal an adverse result on an intermediate submission. The conservative approach for a remediator or a disappointed third party would be to appeal. But that converts an administrative process intended to be at least somewhat cooperative into litigation. It can be expensive. It can make explicit issue preclusion consequences that might otherwise be glossed over. Careful counsel might want to think all these things through with her client. But in many, if not most, cases, the Act 2 process is managed by engineers, and not lawyers.

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